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**COMBATING CORRUPTION:
HOW THE RULE OF LAW CAN DEFEAT A
CULTURE OF IMPUNITY IN AFGHANISTAN**



by

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A Research Report Submitted to the Faculty

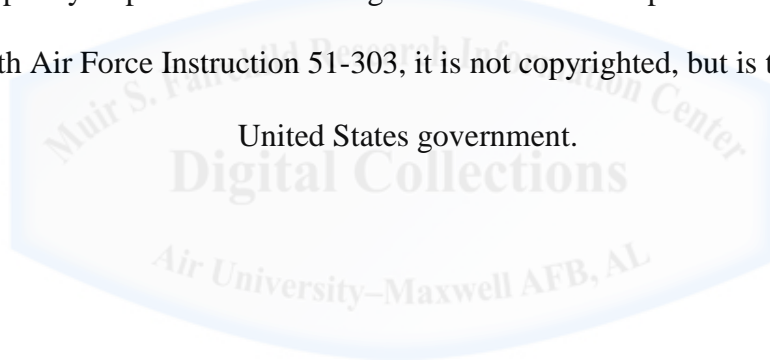
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Abstract

While Afghanistan faces numerous challenges, this paper asserts that the fight against corruption is of paramount concern, an endemic problem which can only be remedied by establishing the rule of law throughout the country. If left unchecked, corruption will continue to prey upon Afghan citizens, weakening their support of the central government while squandering billions of dollars in reconstruction efforts. To counter a growing culture of impunity which impedes our counterinsurgency mission and undermines the central government, United States, multinational, and Afghan leaders must work together to create a fair, accessible, and sustainable judicial system which holds public officials accountable for their behavior while introducing effective processes to peacefully resolve disputes. America's new rule of law strategy realistically seeks to promote anti-corruption measures through increased investment, training, and mentorship in Afghanistan's formal justice sector, while creating greater linkages with traditional, culturally-accepted methods of resolving disputes. With this approach, Coalition-Afghan partners can create a justice system that respects traditional Afghan values while also introducing greater human rights protections for women and minority ethnic groups. Despite previous resistance to "nation-building," establishing the rule of law is a key end state for creating a more peaceful, legitimate, and self-sustaining Afghanistan.

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Corruption is the mother of all crimes in Afghanistan.¹

Mohamed Ishaq Aloko, Afghan Attorney General, 2008.

Winning is a credible government that can enforce the law.²

Anonymous Afghan Embassy official, 2010.

Since the first American boots on the ground arrived a decade ago, over \$70 billion has been spent on rebuilding Afghanistan, aimed at strengthening its central government and state institutions, creating a self-sufficient army and training its police, providing education for women and children, while seeking to deliver basic services for the people. Yet during the same timeframe, up to \$10 million dollars a day in cash was departing Kabul International Airport in suitcases, funneled through a criminal network of high-ranking Afghan government officials, including cabinet ministers, according to the Special Inspector General for Afghanistan Reconstruction (SIGAR).³ According to a 2010 national population survey, 22 percent of citizens stated that corruption was the third biggest problem that government had to address, ranking behind only to unemployment at 23 percent and insecurity at 32 percent.⁴ Moreover, 55 percent of Afghans reported to survey-takers that corruption was a major problem in the daily lives, and an increasing number indicated the problem was getting worse from previous years.⁵

While Afghanistan faces numerous challenges, this paper asserts that the fight against corruption is of paramount concern, a system problem which can only be remedied by establishing the rule of law throughout all parts of the country. Without a fair, accessible, and sustainable judicial system to hold public officials accountable for their behavior along with effective processes to peacefully resolve disputes, the Afghan population will continue to lose faith in its national leadership. Without the support of the Afghan people, America's

counterinsurgency campaign will be unable to turn the tide of instability, internal strife, and violence, no matter how much money, time, and human capital are brought to bear. Afghanistan will remain heavily dependent on international life-support, which will likely diminish in the years to come as Western nations tackle their own economic issues, dooming the Central Asian nation to another generation of heartache, chaos, and lost opportunities.⁶

Based on these intertwined issues, we must consider the following fundamental questions. First, what problem does corruption pose in contemporary Afghanistan and how does it affect its governance? Second, how can America's new strategy for establishing the rule of law in this diverse, divided, and war-torn nation realistically address the breadth and depth of the corruption problem? Third, what type of justice system (or systems) will—and should—the United States and its multinational partners leave behind? Fourth, can this system honor traditional Afghan values and social norms while also providing greater human rights protections, particularly for women and minority ethnic groups? And finally, are we any closer to developing a fair, transparent, and efficient judicial system that Afghans can rely and build upon, or is it a modern-day Potemkin village—an elaborate façade that will fade away once U.S. and NATO military forces have departed?

The Scope of Corruption in Post-Taliban Afghanistan

Every culture struggles with corruption. Yet in Afghanistan, government corruption has reached a truly endemic scale. While cynics may chalk up this behavior as part of the national identity or simply “the cost of doing business,” this problem is not representative of traditional Afghan culture. On the contrary, as an Islamic society, Afghans roundly condemn the offer or acceptance of a bribe as running counter to their faith.⁷ However, since 2001 the problem has worsened as billions of dollars in reconstruction money flooded one of the world's poorest

nations. In 2005, Afghanistan ranked 117 out of 159 nations on Transparency International's Corruption Perception Index (CPI), receiving a score of 2.4 on a scale of 0 (perceived to be highly corrupt) to 10 (perceived to have low levels of corruption). Four years later, Afghanistan ranked 179 out 180 nations just ahead of Somalia as the world's most corrupt nation (Afghanistan had a score of 1.3, with Somalia at 1.1).⁸ In 2010, Afghanistan's CPI score had barely moved up to 1.4, tying it with Myanmar in the globe's three-bottom ranked nations. The United States by comparison ranked 22nd in the world, with a score of 7.1.

Corruption deeply impacts the daily lives of ordinary citizens. According to 2006 study by Integrity Watch conducted in 13 of Afghanistan's 34 provinces, approximately two-thirds of Afghan families reported paying bribes to government officials within a six-month period.⁹ The average cost was the equivalent of \$156 to \$160 U.S. dollars per family—a steep price considering the average monthly rent for a Kabul apartment is \$200 per month.¹⁰ The average number of bribes paid per year was reportedly between 3.4 times and five times per year, according to data collected by the United Nations Office of Drugs and Crime (UNODC).¹¹

At the same time, Afghanistan is presently the world's largest producer of opium, producing three-fourths of the global supply.¹² According to Ambassador Thomas Schweich, who recently served as the U.S. coordinator for counternarcotics and justice reform in Afghanistan, “a lot of intelligence...indicates that senior Afghan officials were deeply involved in the drug trade. Narco-traffickers were buying off hundreds of police chiefs, judges, and other officials. Narco-corruption went to the top of the Afghan government.”¹³ Sharing this view, several analysts estimate that 80 percent of the Afghan National Police (ANP) is involved in the illicit drug trade.¹⁴

Furthermore, so-called criminal patronage networks (CPNs)—deeply connected with organized crime, drug lords, and strongmen—pose a grave threat to good governance. CPNs consist of individuals, businesses, and other powerbrokers engaged in systematic corruption both within and outside the central government. Like parasites, these networks gain their strength by feeding off the lifeblood of the Afghan government, further weakening their host.¹⁵ According to Afghan national security adviser Rangin Dadfar Spata, “in this government we have mafia networks.” Spata further explains that CPNs, “begin with the financial banking system, with corruption networks, with reconstruction and security firms and also with drugs and in the Taliban; they are in Parliament and they are in the government.”¹⁶

Consequently, CPN-backed corruption routinely steals state revenue through schemes such as diverting customs revenue at main border crossings, expropriating state and private land, siphoning development assistance funds, and abusing public and private Afghan financial institutions. Moreover, the U.S. State and Defense Departments both agree that the limited, unresponsive, and unreliable nature of the Afghan justice system is a “central source of Afghans’ grievances with their government and has opened the door to Taliban ‘shadow governance.’”¹⁷ A 2009 report from the United States Agency for International Development (USAID) put the severity of these problems in no uncertain terms:

Corruption has become a system, through a network of corrupt practices and people that reach across the whole of government to subvert government. Particularly pernicious, these networks ensure the guilty are not brought to justice...often the officials and agencies that are supposed to be part of the solution to corruption are instead a critical part of the corruption syndrome.¹⁸

This corruption syndrome costs both the U.S. and Afghanistan governments dearly. Widespread graft has led the U.S. military to create tougher contracting procedures after it was discovered that millions of dollars were being funneled in a “vast protection racket” that paid protection money warlords and insurgents—the very individuals that U.S. forces are seeking to

defeat.¹⁹ Both the International Security Assistance Forces (ISAF) and the multinational community in Afghanistan have spent massive amounts of money through contracting, procurement and development programs, often without adequate oversight.²⁰ Approximately 75 percent of the \$46.4 billion the U.S. has spent on private contractors in theater has gone to fewer than two dozen companies—thus inadvertently lining the pockets of CPNs—according to a Congressional advisory panel on wartime contracting abuses.²¹

Moreover, the Afghanistan Independent Human Rights Commission (AIHRC) states that 15 percent of human rights violations had been committed by the police, including torture, theft, and failure to prosecute murder cases.²² Additionally, AIHRC investigated approximately 2,845 cases of human rights violations from 2007-08. The commission estimated that in 46 percent of these cases, judicial intervention, oversight, and simple competence would have prevented these violations.²³ Specifically, 329 cases constituted violations of due process rights and in 1,843 cases, an effective remedy was not granted, demonstrating a lack of oversight or incompetence.²⁴

Under mounting international pressure, President Hamid Karzai has established a High Office of Oversight and Anti-Corruption as a first-step remedy. He has also created special anti-corruption units in the Office of the Attorney General and the Ministry of Justice. The Afghan government also took the positive step of ratifying the United Nations Convention Against Corruption.²⁵ However, critics have called these steps mere “window dressing,” lacking true accountability, transparency, and vigorous enforcement.²⁶ Many observers have alleged that the Karzai administration tolerates government officials who are engaged in the narcotics trade and other corrupt activity, as well as supporting officials’ receipts of lucrative contracts from donor countries, in exchange for their political support.²⁷

However, corruption should not be seen as an inexorable part of Afghan culture, but rather a historical “aberration” resulting from three decades of war, the collapse of governance, a massive injection of international aid, and the willingness of senior Afghan political leadership to placate powerbrokers in the name of political stability.²⁸ Historical headwinds have played a powerful role in creating a growing culture of impunity. Careening from Soviet occupation to bitter civil war then Taliban tyranny, Afghanistan has been cursed by ongoing destabilizing conflicts and societal unrest which have resulted in a “culture of impunity.” As Brigadier General Mark Martins, the Commander, Rule of Law Field Force Afghanistan, noted in an April 2011 speech to Harvard Law School:

As we move further into 2011, it’s worth recalling that there were core grievances 20 years ago in the Afghanistan of the early 1990’s that spawned and subsequently empowered the Taliban. One of these grievances was the inability of the post-communist Afghan governments to establish a foundation on the subnational level. With no competing authority, the predatory actions of corrupt warlords fueled hatred as strongmen vying for power sought to compel obedience through the use of force in support of blatant self-interests. Under such conditions, even the harsh and repressive forms of dispute resolution and discipline, advertised by the Taliban as justice, seemed a tolerable alternative.²⁹

Access to justice, or the lack thereof, has been a key issue which has inhibited state reconstruction and incentivized corruption. Today in Afghanistan’s 34 provinces and 369 districts, access to justice is severely limited and sometimes treated as a market commodity to be traded to the highest bidder.³⁰ Understood in this historical context, pervasive, endemic and systematic corruption nevertheless prevails today at all levels of Afghan government, distancing its citizens from their leaders while fueling support and sympathy for the insurgency.³¹ Consequently, without a significant reduction in the high levels of corruption permeating the Afghan government, public confidence in the formal justice sector is unlikely to improve.³²

Corruption is a major impediment to arriving at a secure, functional, and trusted central government, which includes the establishment of a formal justice system. While some

commentators have called Afghanistan an ungovernable country, is worth recalling the period of relative peace and prosperity lasted from 1933 to 1973 under the reign of King Zahir Shah.

Zahir Shan sought to modernize the country, while delicately balancing power between his administration and local tribal leaders.³³ Under his rule, Afghanistan never established a strong central government, but nonetheless its culture developed well-established codes of conduct, which governed how to resolve disputes at the local level.³⁴ However, increasing corruption was one of the major factors that ultimately undid Zahir Shah's regime. In 1971, U.S. Ambassador to Afghanistan Robert Neumann repeatedly pleaded with the King to take stronger remedial measures, but to no avail. The anger of Afghan citizens began to boil over as faith in the central government rapidly diminished. As Neumann reluctantly recounted, "In my four and one-half years here, I had never heard so many expressions at all level of society about a feeling of hopelessness that [the] new government could accomplish anything."³⁵

Once again, systematic corruption is eating away at Afghanistan's fragile infrastructure and resources like a corrosive acid, sapping its economic potential, and guaranteeing the nation will continue to be reliant on the welfare of the international community for its survival.³⁶

Ultimately, this is creating what the U.S. State Department calls a "culture of impunity," sowing cynicism and breeding discontent among the Afghan people, some of whom, frustrated with a weak, predatory, and feckless leadership, cast their support to rival power structures and the bloody insurgency. Put bluntly, corruption is a metastasizing cancer that threatens to derail America's counterinsurgency effort and destroy the future viability of the Afghan state.

Securing the rule of law and a building a functioning system of justice is only the possible cure.

While it is not an overnight solution, it is essential that the United States and Afghan partners

establish a legal and judicial system that works for Afghans. As detailed below, these formal and informal justice systems can provide accountability, transparency and equal access to justice.

A Corrupt, Weak, and Predatory Justice System

“Afghanistan cannot be said to have a genuine *system* of justice,” the United States Institute for Peace (USIP) flatly stated following the historic adoption of a national Constitution in 2004. “To be sure, there are many appointed justices and prosecutors in the country, there are laws on the books, but there is no functioning system.”³⁷ Elaborating further, the USIP report stated that court management was “archaic or nonexistent,” and that central judicial and prosecutorial officials lacked the means to communicate with provincial authorities. Judicial appointments were made on “the basis of personal or political connections without regard to legal training or other qualifications...and despite a theoretical right to counsel, there are virtually no defense lawyers in the country.”³⁸ As a senior Afghan judicial official summed up, Afghanistan “has many laws, but no implementation.”³⁹

Although further progress has been made, as of summer 2011, Afghanistan’s Independent Directorate of Local Governance reported that 88 of the country’s 369 districts lacked *saranwhals*, or prosecutors, along with 117 districts lacking judges.⁴⁰ Even more troubling, several studies confirm that Afghan citizens consider the formal justice sector to be one of the most corrupt areas of their government.⁴¹ State courts are still widely perceived to be crooked, inefficient, and inaccessible to the 90% of Afghans who live in rural areas.⁴² Multiple factors contribute to the high level of corruption in the Afghan judicial system, according to the U.S. State Department, Office of Inspector General. A key area of concern is the inadequate

Afghanistan salary structure, where judges' salaries average the equivalent of \$100 U.S. dollars per month, while prosecutors and corrections officials earn even less.⁴³ Consequently, without adequate attention in this area, corruption becomes not a matter of principle, but survival.

By the end of America's first decade in Afghanistan, many observers recognized that the rule of law had not taken root. Bribery, patronage networks, misuse of public funds, abuse of public land management, and profiteering throughout state-owned enterprises were commonplace.⁴⁴ The state justice sector was widely viewed as corrupt and incompetent, clearly lacking in capacity, both in qualified personnel and infrastructure to seriously address corruption, narco-trafficking, organized crime, land disputes, and legal claims large and small. As author Seth G. Jones notes, during the intervening years after our arrival in Afghanistan, "U.S. policymakers had to relearn that building a government in a fractured, xenophobic country is almost infinitely more challenging than overthrowing one."⁴⁵ Jones also captures a key lesson learned that undergirds our current counterinsurgency strategy.

In order to restore peace in Afghanistan, we must first understand the causes of war. Afghanistan's insurgency was caused by a supply of disgruntled villagers unhappy with their government, and a demand for recruits by ideologically motivated leaders. Too little outside support for the Afghan government and too much support for insurgents further undermined governance. This combination provided deadly for the onset—and continuation of the insurgency.⁴⁶

This critical issue of supply and demand underscores the need for greater investment, oversight, and education in Afghanistan's justice sector. It is no coincidence that the Taliban's rise to power resulted from a vacuum of security, governance, and justice following Soviet occupation and civil war. Or that prior to the American surge in military and civilian personnel, Taliban "justice" rapidly returned to regions of Afghanistan where the insurgency was strongest and the state justice sector was at its weakest—either due to marginalization, malfunction, or completely absence from duty.⁴⁷ The Taliban justice system typically presented itself in two

forms: roaming judges and co-opting local elders, according to anecdotal evidence collected by USIP.⁴⁸ Coercion is the preferred method with Taliban judges persuading strong-arming local elders to apply their narrow interpretation of *sharia* law in deciding cases as they see fit.⁴⁹

To break the grip of the Taliban, it became evident that a much greater emphasis and centralized effort for the rule of law was needed. Thus, like the tree falling in the woods when no one is around, the rule of law serves little purpose if it is merely empty theory—without trained, ethical judicial officers, prosecutors, and administrative staff who are present across the country, adequately resourced, with the ability to provide services to all citizens.

The Need for a New Strategy

During a top-level briefing in the summer of 2010, the commander of all military forces in Afghanistan was shown a byzantine PowerPoint chart that attempted to connect the dots in America's bold new counterinsurgency strategy but it looked more like a heap of spaghetti. "When we understand that slide," General Stanley A. McChrystal drolly noted, "we'll have won the war."⁵⁰ Mocked by countless others since, the infamous "spaghetti" chart nonetheless succeeded in illustrating the immensely complex, interconnected, and long-ranging challenges of rebuilding a nation leveled after 30 years of ongoing war. It also raised unintended questions. Amid this blizzard of strategic priorities and projects, what will we leave behind? And will the Afghan government be able to fund and support this justice sector self-sufficiently, without significant international support, both in money and personnel?

Indeed, the rule of law is central to the success of COIN, being described in the 2006 Army counterinsurgency field manual as a "key goal and end state" in Afghanistan?⁵¹ Consequently, the U.S. government's spending to establish the rule of law in Afghanistan has skyrocketed under the administration of President Barack Obama, from an estimated \$7 million

in fiscal year 2002 to an estimated \$411 million in fiscal year 2010.⁵² In July 2010, the State Department established a separate Ambassador-rank position in the Kabul Embassy and appointing Ambassador Hams Klemm to specifically address rule of law issues, with support from high-ranking military judge advocates, a phalanx of “whole of government” agencies, various intergovernmental and nongovernmental actors, private contractors, and multinational partners.

As Ambassador Klemm states, this new organizational structure “was designed with one aim in mind—to enhance our ability to develop the capacity of Afghan judicial and law enforcement institutions to deliver fair, efficient, and transparent justice to Afghan citizens.”⁵³ Furthermore, these efforts are intended to complement ISAF’s expanded mission of training competent law-abiding Afghan National Police and support Afghan-led anti-corruption efforts.⁵⁴

Defining the Rule of Law

The U.S. National Security Strategy states that “America’s commitment to democracy, human rights, and the rule of law are essential sources of strength in the world.” But what exactly is the rule of law? Although there is no universal definition, the U.S. State Department broadly describes the term to encompass “the entire legal complex of a modern state—from a constitution and a legislature to courts, judges, police, prisons, due process procedures, a commercial code and anti-corruption mechanisms.”⁵⁵ Simply put, the rule of law means that everyone must obey the law, the government must follow the law, and no one, no matter how powerful, is above the law.⁵⁶ But is this simply America’s definition of how it sees the world, in trying to force its values on Afghanistan?

While these interpretations reflect Western values, there is a clear international consensus on the importance of the rule of law. For example, in 2004 the U.N. Secretary General stressed

the importance of how the rule of law constitutes a vital “principle of governance” embodied by a nation’s adherence to the supremacy of the law, the equality of citizens before the law, the accountability of government officials to the law, the fairness in its application, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.⁵⁷ Consequently, “all persons, institutions and entities, public and private...are accountable to laws” which are publicly created, equally enforced, independently adjudicated, and consistent with international human rights law.⁵⁸

As Susan Rose Ackerman explains, the rule of law has two distinct aspects: one, setting legal limits, both civil and criminal, on private interactions, while two, imposing limits on a political regime.⁵⁹ Implemented successfully, the rule of law is a keystone upon which a democracy can be established and maintained, creating a vehicle upon which fundamental political, social, and economic rights can be protected, sustained, and enforced.⁶⁰ These operations have been a part of American foreign policy since the Spanish-American War, helping reshape Germany and Japan following World War II, and were used throughout the Vietnam War.⁶¹ Recent rule of law initiatives in Singapore, Liberia, Botswana, and Estonia have yielded a number of insightful lessons and positive results.⁶² Generally, successful efforts have included the immediate firing of tainted or corrupt officials, bolstering public trust in the justice system, developing the professionalization of staff, and inaugurating incentive and performance assessment programs.⁶³

Yet establishing the rule of law in Afghanistan has been a frustratingly difficult and slow process. According to the nonpartisan Congressional Research Service, a multiplicity of factors presently conspire against the establishment of the rule of law in Afghanistan, which include: 1) a lack of overall security and stability, particularly in areas where combat is occurring; 2)

negative perceptions of the Afghan government, which citizens believe to be corrupt, weak, and predatory; 3) the limited capacity of the central government, which has difficulty in recruiting qualified workers in the justice sector, due to low paying jobs and high illiteracy rates; 4) the existence of competing justice mechanisms such as *shuras* and *jirgas*; and finally, 5) traditional Afghan attitudes and affiliations, which may run contrary to the central government.⁶⁴

Following the fall of the Taliban in 2001, piecemeal initiatives began in good faith, starting with the Bonn Agreement, under which the U.S. and multiple nations pledged to rebuild Afghan political institutions and legal procedures while reforming the nation's shattered judicial system.⁶⁵ Yet limited funds and "boots on the ground" (in part due to America's intervention in Iraq), compounded by a reluctance to engage in "nation-building," squandered early opportunities.⁶⁶ Notably, the number of U.S. and international troops in Afghanistan were significantly less per capita than in all other nation building operations since World War II.⁶⁷

The Two Faces of Afghan Justice

There are two types of justice in today's Afghanistan: a formal system of modern brick-and mortar courthouses and informal (or traditional) mechanisms which are deeply rooted in the nation's diverse tribal and ethnic cultures. First, there is the formal system of state-run courts, with judges and attorneys training in civil and/or sharia (Islamic) law. The formal justice system in Afghanistan technically consists of provincial judicial institutions which report to the Supreme Court, the Attorney General's Office and the Ministry of Justice in Kabul. Second, there is the informal "system," which consists of similar, but tailored tribal or village forums like *shuras* and *jirgas*, which apply traditional codes of conduct and dispute resolution, which can vary from tribe to tribe, and village to village. According to a survey, fifty percent of Afghans said they would take a dispute to a state court, compared to 38 percent who would take a dispute to a local

shura or *jirga*.⁶⁸ However, prior to the counterinsurgency “surge,” the formal justice sector had little presence outside of Kabul or major urban areas, leaving traditional justice as the only viable option for the vast majority of Afghans.

Approximately 85-90 percent of Afghan population resides in rural areas. Nearly every village has its own *shuras* (councils) and *jirgas* (meetings of elders), which typically include a unique assortment of tribal leaders, respected elders, militia leaders or strongmen, as well as *ulema*, meaning men with religious training such as *mullahs* and *malawis* (meaning teacher).⁶⁹ Over the past 30 years, Afghans have come to rely on these forums to solve everyday problems and receive social justice, relying on traditional codes of conduct.⁷⁰ Traditionally, a *shura* functions like a nonbinding advisory board for a tribal ruler, who does not have to accept or implement its decisions.⁷¹ By comparison, *jirgas* are open discussion forums where respected men of the village gather to make decisions affecting the community, as well as to arbitrate disputes in accordance with local customs. This includes the local interpretation of the Pashtun code of conduct, or *pashtunwali*.⁷² Rules of dispute resolution, called *narkh* are typically unwritten and based on case precedent.⁷³ Literally, *narkh* means price because every decision made involves certain costs.⁷⁴ Ideally, the informal system presents an alternative to the slow, corrupt state court system, yet many Afghans complain that it has been corrupted as well.⁷⁵

Therefore, Afghans have been challenged to make “strategic choices” in deciding the best approach to resolve their dispute. Noah Coburn describes the politics of dispute resolution as “quite complex.” Afghan disputants must be prepared to answer a myriad of questions: Should the dispute be kept within the family? Should a village elder be approached first or a local religious figure? If the disputant plans to use state institutions, which local officials will most be most likely to resolve the case effectively with a minimum paid in bribes?⁷⁶ As Coburn attests, a

typical disputant must carefully weigh the costs and benefits of all potential courses of actions, as well as the possible political and social pressure that opponents may present. Cases are rarely confined to one venue and routinely move between the formal and informal systems as Afghans “forum shop” for the best outcome.

As the U.S. State Department readily admits, early rule of law efforts got off to a “slow start.” Mentoring programs designed to build up the capacity of the formal justice sector took place primarily in Kabul, not in rural areas where the overwhelming majority of its population resides.⁷⁷ In a war-torn nation, qualified legal personnel were severely lacking. Attempts to recruit, train and assign judges soon became frustrated by the burgeoning insurgency, deteriorating security situation, and a lack of resources.⁷⁸ As a result, the formal justice system was weak, inefficient, and often simply unavailable. For example, in April 2009, only five criminal cases per week were filed in Helmand province and only two cases were adjudicated per month in the Gereshk courthouse.⁷⁹ The National Judiciary, the Officer of Chief Prosecutor and the Ministry of Justice all reported that they were unable to staff personnel in districts outside these urban areas due to security concerns—with good reason. In 2007 the judge for Gashmir was assassinated, and in 2008 the judge for Gereshk was murdered while the judge for Nad-e-Ali survived an attempt on his life.⁸⁰

By 2009, few Afghans understood their nation’s formal legal code, including a high number of judges and legal officers.⁸¹ Only 56 percent of Afghan judges had university-level legal educations (either secular or *sharia* training).⁸² Many attorneys, including several members of the Supreme Court, have been only received education in *madrasas*. Without access to legal texts, a high number of justices were unfamiliar with the law and made no reference to it in their decisions.⁸³ As a result, the formal justice sector, along with the central government was viewed

as both weak and predatory, with subnational government structures woefully inadequate or nonexistent.⁸⁴ Despite the good intentions and high idealism of Western governments after the Bonn Conference, the early rule of law framework in Afghanistan was floundering.

Much of this was a result of America's initial goal to adopt a "light footprint" approach in Operation ENDURING FREEDOM, which squandered precious time, international consensus, and potential resources. As former Undersecretary of Defense Policy Douglas Feith acknowledged, "nation-building [was] *not* our strategic goal...[Secretary of Defense Donald] Rumsfeld was determined not to do "nation-building as the United States typically did it in the 1990's."⁸⁵ Another factor was the lack of a coordinated interagency and multinational effort. Different civilian and military agencies, IGOs and NGOs pursued rule of law development with different goals, methodologies, and timelines. While well-intentioned, these dueling efforts were both contradictory and redundant, with the left hand not realizing what the right was doing.⁸⁶ Ultimately, the U.S. was forced to engage in the coordinated nation-building effort it originally avoided, discovering that Afghanistan's central and subnational governments lacked the basic institutions required to prevent the Taliban, al-Qaeda, and other militant groups from returning to power.⁸⁷

Based on these deficiencies, a new strategic framework was chartered to achieve U.S. goals in Afghanistan, including the 2009 *Integrated Civilian Military Campaign Plan*, and the 2010 *Afghanistan and Pakistan Regional Stabilization Plan*. Both of these plans recognize strengthening of the rule of law and the access of Afghan citizens to justice is a top priority.⁸⁸ Furthermore, the U.S. has also developed additional strategies which to implement the rule of law in Afghanistan.⁸⁹ "A crosscutting element of all governance programs is support of

reinvigorated Afghan plans to fight corruption, with concrete measures of progress toward greater accountability,” according to the regional stabilization plan.⁹⁰

Fair, Efficient, and Transparent Justice

The U.S. Government Rule of Law Strategy for Afghanistan is a byproduct of intensive interagency consultation and ongoing negotiation with host-nation and international partners.⁹¹ Involving a broad range of organizations and actors, it has two primary objectives. First, U.S. rule of law assistance will (a) offer Afghan citizens meaningful access to fair, efficient, and transparent justice, and (b) help eliminate alternative Taliban “justice” systems, in order to defeat the insurgency. Second, the U.S. seeks to strengthen the Afghan government’s legitimacy and improve its perception among its people by “promoting a culture that values the rule of law above powerful interests.” Notably, this strategy seeks neither to replace traditional informal justice systems (which are preferred by many Afghans over its state justice sector), nor impose a Western-style justice system, which avoids early rule of law mistakes made in Iraq⁹²

This strategic vision is supported by four “pillars,” which are designed to implement rule of law programs that: (1) Tackle the pervasive culture of impunity by improving and expanding access to the state justice sector through increasing capacity and reducing corruption in the justice sector’s institutions; (2) Reform the Afghan corrections system and its policies in order to reduce the radicalization of detainees while increasing the focus on rehabilitation and de-radicalization⁹³; (3) Provide security and space for traditional justice mechanisms to reemerge “organically” in areas cleared of the Taliban, while engaging closely “at the grassroots level” to ensure dispute resolution needs in communities are being met; and, (4) Build the leadership capacity of the Afghan government, particularly justice sector officials as well as civil society generally.⁹⁴

Specifically, major anti-corruption efforts now include: improving financial oversight, building judicial capacity to investigate, prosecute, and remove corrupt officials, as well as education and empowerment of the Afghan public to participate in accountable and transparent government.⁹⁵ Presently, the Justice Sector Support Program (JSSP) is engaged in a multi-prong effort to develop and strengthen the capacity of the Afghan criminal justice sector.⁹⁶ JSSP works with state justice institutions to provide technical assistance and training in areas such as police-prosecutor coordination, focus-district development, crime scene investigation, gender justice assistance, among other programs.⁹⁷

Further efforts along these lines can be seen in the activities of the Combined Joint Interagency Task Force-Shafafiyat (which means “transparency” in Dari and Pashto), which stood up in August 2010.⁹⁸ Partnering with Afghan government, the task force’s mission is to ensure a shared understanding of the corruption problem and its destructive impact on Afghan society, while implementing ISAF anti-corruption initiatives, and integrating these activities with key partners. Specifically, this interagency team seeks to build “islands of integrity” inside and outside of the Afghan government to instill a “culture of lawfulness,” rather than one of impunity.⁹⁹ Throughout these initiatives, CJIATF-Shafafiyat seeks to promote the traditional Afghan values of “honor, charity, and justice” through direct and sustained engagement with key Afghan leaders. This also includes the sponsorship of civic education programs in schools, training programs, and the nation’s growing entertainment industry. For example, Afghan artists and filmmakers have sought to promote the stories of “whistleblowers and anti-Mafia heroes,” to gradually reshape societal norms. Rule of law comic books have even been issued to Afghan youth attending local schools.¹⁰⁰

In light of the potential withdrawal of U.S. forces from Afghanistan in 2014 or earlier, CJIATF has set four broad goals to measure the success of its initiatives and to achieve a positive end-state. These include: (1) An Afghan government that recognizes the nature, scope, and corrosive effects of corruption, taking ownership of anti-corruption efforts, and punishing criminal actors and networks; (2) A professional army and national police force that protects and respects the rights of Afghan citizens and is supported by and responsive to accountable security ministries; (3) A diminished narcotics-trafficking industry whose links to CPNs within the Afghan government are severed, and (4) Judicial institutions that are responsive to popular grievances and enforce the rule of law.¹⁰¹

Measuring Success

Through CJIATF-Shafafiyat, JSSP, and similar efforts, formal justice institutions have been considerably strengthened and expanded with U.S. support. By May 2010, prosecutors were routinely hearing cases in cleared provinces, such as Garmsir, Marjah, Sangin, Nawa, and Nad Ali, while the caseload in Gereshk picked up significantly.¹⁰² But how do we know if Afghans trust their sector? How is progress being accounted for?

First, the Rule of Law and Law Enforcement Directorate plans to use polls, surveys, and other means to track public opinion and evaluate ongoing programs. Specifically, the following metrics will be tracked, including: (1) the number of cases heard by state judges; (2) the number of qualified judges who receive proper training—and have work experience applying that training; (3) the ability of criminal defendants to access *pro bono* defense attorneys; (4) the decrease in the average wait-time for a case to proceed from arrest to investigation, prosecution, conviction, and incarceration; (5) the number of law facilities with updated law books; (6) the number of trained, licensed attorneys; (6) improved compensation for justice sector employees;

(7) the number of trained and equipped judicial security guards/police to protect sites; and, (8) the number of cases successfully prosecuted by the Counternarcotics Justice Task Force.¹⁰³

Additionally, David Kilcullen has proposed an unorthodox yet effective two-prong test in his book *Measuring Progress in Afghanistan*. The first question in assessing rule of law efforts is to ask: where do the judges sleep? If they feel truly secure, it will be in their assigned districts. However, if they travel from a regional or national capital, or never even visit their districts at all, it suggests a low level of personal security—and the citizenry will have “a correspondingly weak opinion of that judge’s commitment to them.” The second question is, “If your bicycle were stolen, to whom would you report it? If the answer is someone other than the police, then the police do not have the confidence of the people—indeed, they may be seen as an officially-empowered predatory group to be avoided.”¹⁰⁴

To tackle the culture of impunity, rule of law officials are working with Afghan legal experts to establish minimal qualifications for judges and prosecutors. Further, they are creating a network of pro bono advocates for Afghans in civil disputes concerning property and family law, so that money is not a bar to the courthouse door.¹⁰⁵ Next, U.S. officials are encouraging the Afghan Supreme Court to establish a new court of special jurisdiction to prosecute cases such as international commercial disputes (a key issue for foreign businesses seeking to invest in Afghanistan). To reform the corrections system, the U.S. is funding the construction of pre-trial detention and prison facilities, along with ensuring the Afghan government has the sufficient budget and resources to operate these facilities effectively.¹⁰⁶ To help prevent abuses in the prison system, officials are partnering with the Afghan legal community, tribal leaders, judges, corrections officials, and legal advocacy organizations to identify and adopt alternatives to

incarceration in key areas.¹⁰⁷ Over the next three years these activities and programs will be expanded as security allows to priority and non-priority districts across Afghanistan.

Supporting Traditional Justice

Development of the formal justice system in Afghanistan will take time, patience, and considerable care and feeding to bear fruit. What took three decades to demolish cannot be rebuilt overnight. Therefore, the U.S. strategy also seeks to create space for traditional, or informal, dispute resolution mechanisms to reemerge in areas cleared of the Taliban, provided they uphold the national Constitution.¹⁰⁸ This is a marriage not of love, but of necessity, due to fact that at the sub-national level Afghans overwhelmingly resolve disputes through traditional means. Starting with USAID and NGO-led pilot projects, the U.S. will seek to increasingly link traditional justice methods to the evolving formal justice sector, including the establishment of a national policy by the Ministry of Justice on traditional dispute resolution.¹⁰⁹ Currently 80 percent of legal claims and 90 percent of dispute resolution in Afghanistan are handled by *jirgas* or *shuras*. While this displays a lack of faith in the legitimacy and efficiency of the formal Afghan legal system, it also shows that traditional forums can assist in governing and play a vital role in providing access to justice outside of urban centers.¹¹⁰

Moreover, most citizens believe these informal systems to be “faster, fairer, more comprehensive, affordable and accessible, and less corrupt,” according to a study by the Canadian Parliament.¹¹¹ Consequently, formal courts state they are willing to endorse the decisions of *jirgas*, provided they are consistent with *sharia*, Afghan civil law, and the national Constitution.¹¹² At the district level, the informal justice system is culturally accepted,

conveniently accessible, and in some cases “the only game in town” for rural Afghans to peacefully resolve their disputes.

The looming question, however, is whether these traditional justice mechanisms can develop to the extent that they provide protection to traditionally marginalized groups in Afghan society, including women, and meet international standards. Many human rights observers have expressed grave reservations. First, they are concerned with the influence, coercion, and control that the Taliban and other militant groups can wield in these forums, resulting in a shift in power from tribal elders to armed groups.¹¹³ Second, local decisions may be inconsistent, arbitrary, and discriminatory towards minority groups and those at the margins of Afghan society—especially towards women and children.¹¹⁴ Traditional dispute-resolution practices in Afghanistan often exclude women from the process and deny their legal rights. As one critic notes, “The outcomes produced by the informal system are far from ideal. At their best, they rely on social cohesion and conceptions of fairness to solve problems and maintain community harmony.”¹¹⁵ At their worst, traditional forums perpetrate gross human rights abuses such as forced marriage and extrajudicial killings.¹¹⁶ Women have resorted to suicide, including self-immolation, when they believed there was no escape from their situations. During the first nine months of 2010, AIHRC documented 111 cases of self-immolation, compared with 86 cases in 2009.¹¹⁷ Last July, Faizallah Kakar, presidential advisor on health, reported that 2,400 women commit suicide every year in Afghanistan due to depression resulting from concerns over continued conflicts, or to escape underage and forced marriages, (including *baahd* to a rival tribe) honor killings, forced prostitution, and sexual violence. The United States Institute for Peace notes in its report that women’s groups naturally oppose any rule of law projects that “strengthen” traditional practices which disenfranchise and repress women and young girls.¹¹⁸

Furthermore, human rights groups criticize the lack of linkages between government and district communities in dispute resolution, as well as a gross lack of oversight by the formal justice system. There are also few linkages to non-governmental legal organizations and human rights groups. Here there is a ripe opportunity for indigenous NGOs to act as advocate for traditionally marginalized groups, while providing further transparency at the village level. Such groups can play a critical role in promoting universal values that honor concepts of Islam, Afghan values, and international standards.

Recommendations and Conclusion

During World War II, Hollywood filmmaker Frank Capra directed a series of short motion pictures, entitled *Why We Fight* to rally support for the war effort against Nazi Germany. Yet today in Afghanistan many are confused over our mission and whether it is worth the cost, as the patience of policymakers and the American taxpayer grows thin over in a time of global economic crises and fiscal austerity at home. Currently, there is widespread debate whether the very presence of international funds and military forces is further encouraging disputes, especially in traditional systems.¹¹⁹ “The history of Afghanistan,” social scientist Oliver Roy reminds us, “is one of revolts against central power and of resistance to the penetration of the countryside by state bureaucracy.”¹²⁰ This cultural divide is deeply embedded in the nation’s fledgling justice system. Meanwhile, U.S. tensions with the Karzai government seem at an all-time high, while U.S. relations with neighboring Pakistan have sunk to new lows. Rampant, widespread corruption squanders millions of dollars in international reconstruction efforts while eroding the Afghan people’s trust in, and support of, their central and subnational governments. Now that Osama bin Laden lies in an unmarked watery grave, what are we fighting for in Afghanistan? And after the bulk of uniformed forces leave, what will we leave behind?

David Galula, the godfather of modern COIN theory reminds us that “victory is not the destruction in a given area of the insurgency and his political organization. If one is destroyed, it will be locally re-created by the other; if both are destroyed, they will be both re-created by a new fusion of insurgents from the outside.” Rather, victory can only be achieved when the insurgent is permanently isolated from the population; an “isolation not enforced upon the population, but maintained by and with the population.”¹²¹ To achieve victory in Afghanistan, international forces are now living among the local population and providing protection until they are able to protect themselves with a minimum of outside support, reaching the point where the power of the Taliban and other militant groups cannot be easily rebuilt.¹²²

Establishing the rule of law in Afghanistan is critical to reaching this end state and rightly been made a top priority in America’s new regional stabilization. Overall, America’s rule of law strategy is sound, stands a realistic chance of success, and positive progress is being made. Yet we must be clear-eyed that this is a long-term, generational effort that civilian, international, and NGOs must continue, even after the bulk of military forces have left Afghanistan. First, to overcome corruption and provide long-term stabilization, Afghanistan requires a capable formal justice sector to provide fair, accessible and transparent justice. Here, the Anti-Corruption Unit (ACU) established within the Attorney General’s Office shows great promise. Since 18 April 2009, the ACU, comprised of 40 prosecutors had reviewed approximately 646 reports of corruption and has initiated 157 investigations including allegations of large scale corruption.¹²³ Now that this capacity exists, leaders in the justice sector, as well as the central government, must have the willpower to prosecute corroborated corruption cases. This area must continue to receive crucial continued training, funding, mentorship, and focus.

Secondly, it is critical that we create a combined justice system that works for Afghanistan as it is, rather than Afghanistan as we would like it to be. Here, our rule of law strategy correctly recognizes the powerful role that traditional justice mechanisms play in shaping Afghan society, and strives to create greater linkages between these widely-accepted forums and the formal justice sector. As the United States Institute of Peace recommends, progressive interpretations of shari'a and religious education must be disseminated at every level of society through credible actors at the district level to inform citizens of the ways in which Islamic law protects the rights of women and at-risk groups.¹²⁴ Thus, rather than strengthening *shuras* and *jirgas* themselves, we must forge tighter connections between the informal and formal systems, introducing greater accountability into the informal system.¹²⁵ These efforts should maximize the positive aspects of these forums while minimizing and preventing negative outcomes and side effects.¹²⁶ As observers have noted, rule of law programs in stable districts cleared of the Taliban can build important lessons and best practices, and successful projects can have positive spillover effects across provinces. In the optimal cases, these programs can create "change agents" at the local level, who have the most considerable influence in the community to positively introduce, publicize, and popularize modern concepts of justice.¹²⁷

Networking Afghanistan's divided and diverging systems of dispute resolution will not be easy. Essentially, we are now attempting to steer two separate vehicles traveling down two different roads—the freshly-paved network of highways of the formal justice sector originating in Kabul, which no one knows quite how to navigate—and the time-honored, trusted but rutted paths of *shuras* and *jirgas* on the Afghan frontier. We hope the two roads will meet in the middle, but cannot be sure this is where our efforts will lead. However, recognizing the corruption, inadequacy, and deep mistrust of the former, and the widespread acceptance (but

potential for abuse) of the latter, reform is required in both areas. Ideally, the formal sector will gain acceptance, while the traditional sector grows more progressive. However, at a minimum, the informal system will provide some measure of stability for the majority of Afghans. Outside observers may throw up their hands dismissively, arguing that Afghanistan is ungovernable, its current conflict is unwinnable, and any effort to overcome corruption is futile. Yet the Afghan people want change. They want corruption to end. They want peace and justice. We cannot force a system to work, but we can provide the support, capacity, and guidance to grow. In light of rising insecurity, Afghan leaders have seen a false choice between “peace” and “justice,” and between corruption and political instability.¹²⁸ While understanding the complex balance of power that the central government must maintain, we cannot let Afghan leadership off the hook. The homegrown support Afghan institutions both in and out of government, is essential in ensuring fairness, transparency, and broad-based acceptance.

By the same measure, we must be patient. Despite initial resistance to state-building, long-term investment is necessary to complete the mission and establish the rule of law in Afghanistan. The U.S. has a vital national security interest in avoiding a repeating a failed Afghanistan, where violent extremists can again seek refuge. Corruption, left unchecked, will continue to bleed dry the very legitimacy of government, suffocating any hopes for a free Afghanistan, and forcing the people back under the control of warlords, terrorists, and bandits. Regardless of the level of funding and boots-on-the-ground support, a lasting, stable, and secure government can only take root if the Afghan people find it legitimate.

Step by step, legal awareness, accountability, and oversight must continue to be developed within both the formal sector and traditional forums. Investment in the rule of law is the most cost-effective means of ensuring that in the long-run, Afghanistan is able to peacefully

resolve its disputes, which will pay dividends in strengthening the whole of government and civil society. For the United States, the international community and the Afghan people, achieving victory in Afghanistan will be a credible government that can enforce the law. With patience, trust, and vigilance, the promise of a stable, secure, and free Afghanistan can be reached by helping justice weed out corruption in the hard-fought soil of the Hindu-Kush.

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¹² United States Institute for Peace, *Establishing the Rule of Law in Afghanistan*, 13.

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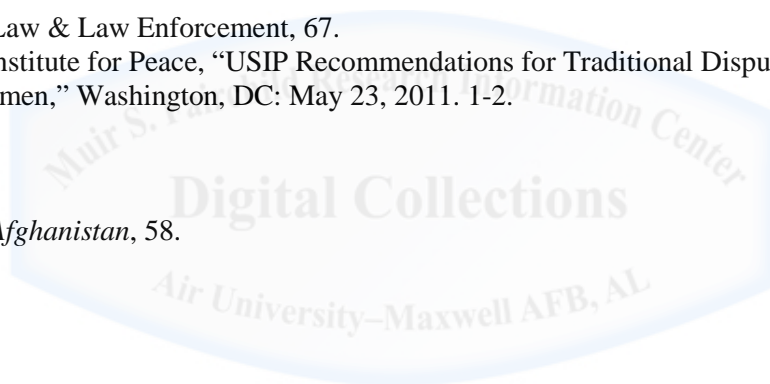
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